United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

609

No. 22220

HENRY T. JANNE, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

Appeal from the United States District
Court for the District of Columbia

HARVEY B. BOLTON, Jr.
Counsel for Appellant
(appointed by this Court)
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

STATEMENT OF QUESTIONS PRESENTED

1. Should the trial judge have disqualified himself from hearing the case after jury trial was waived, when the judge, now, also the trier of fact, had been advised of defendant's entire criminal conviction record prior to the waiver?

2. Did the trial judge abuse his discretion by not granting a continuance requested by the defendant in order to allow his counsel to verify certain facts; facts and information counsel was unable to investigate immediately prior to trial due to the rioting in the city.

This case has not been before this Court before.

I N D E X

TABLE OF CASES

Cases - Continued

S T A T U T E S

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 22220

HENRY T. LANNE, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

Appeal from the United States District
Court for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appelant's application for leave to appeal in forma pauperis pursuant to 28 U.S.C. §1915 and under Rule 41(a) of the Court of Appeals in the District of Columbia was timely filed and was granted

by the District Court. Jurisdiction is vested in this Court by virtue of the Act of June 25, 1948, c.646, 62 Stat. 929.930 as amended, 28 U.S.C. §1291 and §1294.

STATEMENT OF THE CASE

During the evening of December 26, 1967, the defendant Henry T. Lanne was driving a vehicle he had found abandoned several days earlier. (Tr. 91,92)[1], when he was stopped by a police patrol wagon (Tr. 37) in the vicinity of 15th and S Streets, N.W., Washington, D.C., and placed under arrest. The charge was unauthorized use of a vehicle, 22 D.C. Code §22 (1961 ed.).

At his trial Defendant Lanne explained that on December 24, 1967, he had been on his way to the house of a friend and while passing the intersection of 10th and V Streets, N.W., he noticed a vehicle among the wrecks which appeared in fairly good condition (Tr. 91,92). The vehicle was without license plates so the defendant tinkered with it, discovering a set of keys on the front seat. Quite a few of the keys fit the ignition but only one key actually turned the motor, and after the defendant had adjusted the carburetor he was able to start the motor. (Tr. 92,93,94). Several minutes later while walking away from the intersection the defendant found a set of matching license plates in the dirt. He immediately placed these on the vehicle he had just started,

---

1 The abbreviation "Tr" refers to the trial transcript consisting of one volume with 120 consecutively numbered pages.

fearing that unless there were some indication of ownership the car would be stripped. (Tr.34).

When December 26th arrived the defendant noticed the vehicle had not been claimed, nor had anyone removed the plates he had placed on it. This confirmed his belief that the vehicle was indeed an abandoned car. So, in the early evening he claimed the vehicle, drove it to a service station, filling the tires and gas tank. After this he picked up his girl friend and after driving her to the cleaners he was arrested. (Tr.[illegible],112).

Officer Claucolus Bonner of the Metropolitan Police Department had visited the area of 10th and V Streets, N.W., Washington, D.C., on the day of the trial. He testified that he observed some cars in the area without tags and that some were in fair shape while others were in poor shape.(Tr. 54,56,57,58) Officer Y. C. Laws of the Metropolitan Police Department also had visited the 10th and V Street, N.W. area on the day of the trial and he too noticed abandonned cars in the area. The locale was described by Officer Laws as a good dumping area for automobiles and he remembered patrolling the area and giving it special attention as far back as the third week in December, 1967, (Tr.74, 78), although he did not recall seeing the particular vehicle in question parked in the area at that time. (Tr.34).

Defendant Lanne stated that he had no criminal intent. He was looking for a car body so that he could place another engine in it and race it. He believed the car to be abandoned. (Tr.97,

99, 100).

The prosecution's first witness was Charles Washington of the District of Columbia. He identified himself to be the owner of a 1960 white oldsmobile four-door sedan, D.C. license plate 327-730. About 10 P.M. December 23, 1960, he parked his car on the 1300 block of Belmont Street, N.W., locking it and taking the keys with him. An hour or an hour and one half later he returned to get his car and it was gone. He had not given permission to anyone else to drive the vehicle and specifically stated that he did not grant the defendant permission. The next time he saw his car was at the 13th precinct when he was called to pick it up. After picking it up he found his tags under the seat of the car. (Tr. 29,30, 32, 34).

Following Mr. Washington to the stand was Officer Bonner. He testified that while working with the Special Operations Division on December 21, 1967, at around 1:00 P.M. he noticed a white oldsmobile in the northwest section of Washington, D.C. His attention was drawn to the vehicle because of a look-out he had for the tag the automobile was bearing, which was D.C. 262-337. He and Officer Laws, his partner, spotted the vehicle near 14th and F Street, N.W., and followed it, eventually ordering it to stop. The defendant was identified as the driver of the car and Officer Bonner stated he was unable to produce any indicia of ownership. (Tr. 43,45). While he was questioning Defendant Lanne, Officer Bonner peered inside the car and observed a set

of D.C. tags under the back seat. He identified these tags as 327-730. (Tr. 41). The car was in running condition but officer Bonner was unable to see any key in the ignition nor were any found on the defendant after a search of his person. (Tr. 46,50, 51). Officer Hews also stated their attention was drawn to the oldsmobile by its license plates and identified the defendant as the driver. (Tr.71)

At the conclusion of the case the Court stated that it did not believe the testimony of the defendant and found him guilty.(Tr.120). On July 5, 1966, the appellant was sentenced to serve an eighteen to fifty-four month term of imprisonment.

FACTS RELATING TO POINT I

After the case was called and while responding to a request by the Court concerning preliminary problems, counsel for the government advised the Court of the defendant's entire criminal conviction record, stating that in 1965 Henry T. Lanne pleaded guilty to attempted housebreaking and petty larceny. Immediately thereafter, defense counsel announced that his client was waiving jury trial and this action was consented to by the prosecution (Tr.3,4,5,).

FACTS RELATING TO POINT II

Following the government's opening statement counsel for the defendant stated for the record that the defendant had request-

ed a continuance in order to enable his counsel to verify certain facts. The trial was held on April 15, 1968, and counsel stated that due to the "situation in Washington over the past week or ten days" he had not had an opportunity to "verify and check out certain facts that defendant has given counsel." (Tr.). He wanted to search for possible witnesses, admitting, however, that he was not sure a further search or investigation would be fruitful. (Tr. 23,24).

STATUTES OR RULES INVOLVED

14 D.C. Code 305 (1961 ed.)

> A person is not incompetent to testify in either civil or criminal proceedings by reason of his having been convicted of crime. The fact of a conviction may be given in evidence to affect his credibility as a witness, either upon cross-examination of the witness or by evidence of allunde; and the party cross-examining him is not bound by his answers as to such matters...

STATEMENT OF POINTS

1. The trial judge should have disqualified himself from hearing the case after jury trial was waived and he became the trier of facts, since he possessed knowledge of the defendant's entire criminal conviction record.

2. The trial judge abused his discretion by not permitting the defendant a continuance to enable his counsel to pursue his investigation of the case which was interrupted by the riot

of April, 1968.

SUMMARY OF ARGUMENT

I

Decisions of this Court have allowed the defendant in a criminal case to invoke immunity or partial immunity from the impeachment permitted by Title 14, D.C. Code 1978 (1961 ed.). Under certain conditions. Delicate guidelines have been defined and re-defined to assist the trial judge in his decision. His role is to screen and eliminate from the trier of facts that which would be unnecessarily prejudicial to the defendant or unduly obstructive to the ends of justice. In the present case when the trial judge became also the trier of facts and possessed as he was of the knowledge of defendant's entire criminal conviction record, he should have sua sponte disqualified himself as trier of fact.

II

Defense counsel represented to the Court that he had been unable to investigate to his satisfaction some of the information provided him by his client due to the rioting which shook this city in the early part of April, 1968. A continuance had been granted on March 20, 1968, and if there were compelling reasons to grant a continuance on that date they still existed on April 15, 1968.

A R G U M E N T

I

THE TRIAL JUDGE SHOULD HAVE DISQUALIFIED HIMSELF AFTER JURY TRIAL WAS WAIVED AND HE BECAME THE TRIER OF FACTS SINCE HE, AS TRIER OF FACTS, POSSESSED TAINTED KNOWLEDGE CONCERNING DEFENDANT'S RECORD OF CRIMINAL CONVICTIONS.

The question of the admissability of a defendant's prior record of convictions as evidence in a case when he takes the witness stand under Title 14 D.C. Code 305 (1961 ed.) has been the subject of a number of recent decisions of this Court beginning with Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763. The Luck decision noted that the impeachment proceeding outlined under the Statute is not mandatory and it urged the trial judge in his discretion to apply certain standards in determining whether or now much a jury should be permitted to hear of a defendant's past record if he is to take the witness stand. The Court, Luck announced, must decide if the prejudicial effect would outweigh the probative relevence of the conviction and it should also consider if the cause of truth would be helped more by letting the jury hear the defendant's story.

This umbrella of immunity or partial immunity was again discussed in Gordon v. United States ___ U.S. App. D.C. ____, 383 F.2d 936; this time the Court set further guidelines for the trial judge and suggested a procedure to be used in the future whereby Luck questions would be raised in advance by defense coun-

sel and decided out of the hearing of a jury. Other recent cases have helped to chisel and refine the basic doctrine enunciated by Luck, Brown v. United States, 125 U.S. App. D.C. 320, 370 F.2d 405, Brooke v. United States, ___ U.S. App D.C. ____, 305 F.2d 270, Hood v. United States, 125 U.S. App. D.C. 1, 365 F.2d 640, and Stevens v. United States, (Wahy J.dissenting) 125 U.S. App. D.C. 231, 370 F.2d 405.

In Gordon v. United States (supra) this Court discussed the philosophy of the constraints placed on the impeachment statute, 14 D.C. Code 305 (1961 ed.) stating,

> In considering how the District Court is to exercise the discretionary power we granted, we must look to the legitimate purpose of impeachment which is, of course, not to show that the accused who takes the stand is a 'bad' person but rather to show background facts which bear directly on whether jurors ought to believe him rather than other and conflicting witnesses.

The credibility of the Appellant, Henry T. Lanne, suffered a grievous blow at the very outset of this case when the prosecutor, responding to the trial judge's questioning (Tr. 3,4,5,) and without knowledge that the appellant intended to waive trial by jury, described to the Court the plea of guilty Lanne entered to attempted housebreaking and petty larceny in 1965. Thus, the trier of facts without benefit of judicial screen or shield was immediately exposed to the type of knowledge Luck and the other recent decisions of this Court sought to limit. Appellant submits that because the trial judge in the case was immediately alerted to the

defendant's conviction record and immediately thereafter he became aware of the fact that he was to be trier of facts, he should have ruled on the use and admissibility of the convictions and thereafter disqualified himself from hearing the case. It was an abuse of his discretion not to have disqualified himself.

II

THE COURT ABUSED ITS DISCRETION BY NOT GRANTING A CONTINUANCE TO ENABLE DEFENCE COUNSEL TO INVESTIGATE TO HIS SATISFACTION LEADS PROVIDED BY HIS CLIENT THAT HE WAS UNABLE TO PURSUE IMMEDIATELY PRIOR TO TRIAL DUE TO THE RIOTING IN WASHINGTON, D.C.

This case was originally set for trial on the 20th of March, 1968, (Tr.11) and on that date counsel for the defendant requested a continuance and the case was reset for April 15, 1968, the date on which Defendant Lanne was tried and convicted. Although the record does not indicate the precise reasons advanced by counsel for the March continuance, it can be fairly surmised that it was for the purpose of verifying and checking out certain facts given him by the defendant (Tr.9,10). Counsel stated: (Tr.9)

> I have not had this opportunity because of the situation in Washington over the past week or ten days ...

The Court also commented on the situation, stating. (Tr.11, 12)

> The matter that bothers me is he asked

> for a continuance on the 24th of March and we have had some events in the District of Columbia which have interfered with nearly every normal operation and one of those is the Courts.

And again(Tr.12):

> If I were in his shoes I would not have wanted to have gone in that area in the last week.

The granting of a continuance is a matter within the sound discretion of the trial Court, Wood and Bernis v. Young, 8 U.S. 237, 4 Cranch 237, Taylor v. Yellow Cab of D.C, 31 A.2d 431. Yet it is submitted that in this instance the Court abused its discretion for certainly if there were compelling reasons for granting the March continuance these reasons were still present on the trial date, April 15, 1968, some few days after the rioting had abated.

C O N C L U S I O N

WHEREFORE, it is respectfully urged that the conviction be reversed and the defendant be granted a new trial.

HARVEY B. BOLTON, Jr.
Counsel for Appellant
(appointed by this Court)
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

INDEX

TABLE OF CASES

Page

OTHER REFERENCES

ISSUES PRESENTED

In the opinion of appellee, the following issues are presented:

1. Whether the trial judge should have disqualified himself on his own motion in a non-jury trial merely because he learned of defendant's prior convictions before the defendant waived his right to a jury trial.

2. Whether the trial judge abused his discretion by not granting a continuance when defense counsel stated that he could not present any more evidence even if he were given a thirty day continuance, that he had the evidence he would like to present and that he was ready to go to trial.

This case has not previously been before this Court.

United States Court of Appeals
For the District of Columbia Circuit

No. 22,220

HENRY T. LANNE, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal from a judgment of conviction for unauthorized use of a vehicle, 22 D.C. Code § 2204, entered on April 15, 1968, after a one day trial before United States District Judge William B. Bryant.

The Facts

At approximately 10:00 p.m. on December 23, 1967, Charles Washington parked his 1960 Oldsmobile in the 1300 block of Belmont Street, N.W., and went to visit friends. He locked the car and took the keys with him. Between an hour and an hour and a half later, he returned and discovered that his car had been stolen. He immediately reported the theft to the police. (Tr. 28-31.)

United States Court of Appeals
For the District of Columbia Circuit

No. 22,220

HENRY T. LANNE, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal from a judgment of conviction for unauthorized use of a vehicle, 22 D.C. Code § 2204, entered on April 15, 1968, after a one day trial before United States District Judge William B. Bryant.

The Facts

At approximately 10:00 p.m. on December 23, 1967, Charles Washington parked his 1960 Oldsmobile in the 1300 block of Belmont Street, N.W., and went to visit friends. He locked the car and took the keys with him. Between an hour and an hour and a half later, he returned and discovered that his car had been stolen. He immediately reported the theft to the police. (Tr. 28-31.)

Three days later, at about 6:00 p.m. on December 26, police officers Claudius Bonner and Y. C. Laws were approaching the intersection of 14th and R Streets, N.W., in their marked patrol wagon when they spotted the defendant, Henry T. Lanne, driving a 1960 Oldsmobile bearing a license plate number listed on their Hot Sheet of wanted cars. This license plate number was not the number which Mr. Washington reported on his stolen car but was wanted in connection with another case involving the same defendant.[1] (Tr. 42-45, 69-72.)

The officers followed the car for a few blocks to the corner of 15th and S Streets, N.W., where the defendant stopped for a red light. As soon as the car stopped, a young female companion who was in the front seat jumped out and started running. The two officers immediately jumped out of their patrol wagon. (Tr. 72-74.) While Officer Laws caught the young woman, Officer Bonner approached the defendant and asked him for the car's registration papers, his driver's license or any other identification. After the defendant failed to produce anything, Officer Bonner noticed that there was no key in the ignition and that there was another set of license plates on the floor between the front and rear seats. (Tr. 45-47.) It was later learned that these license plates were on Mr. Washington's car at the time it was stolen. The defendant was placed under arrest.

The Trial

a) Preliminary Matters

The trial began with the Judge asking if there were any preliminary problems such as prior convictions which the Government might want to use for impeachment purposes

---

[1] In that case, Cr. No. 126-68, the Government introduced evidence showing that on December 23, 1967, the same night that Mr. Washington reported his car stolen, a family returned home and found defendant Lanne stealing their property. After firing several shots at the family, the defendant escaped in a Cadillac bearing the same license plates that were on the Oldsmobile at the time of defendant's arrest. The defendant was convicted by Judge Walsh on April 22, 1968, of housebreaking, grand larceny, assault with a dangerous weapon (pistol) (two counts, two individuals) and carrying a dangerous weapon.

under *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965). The Government replied that the defendant had pleaded guilty to attempted housebreaking and petty larceny in 1965 and had been sentenced under the Youth Corrections Act. The Government stated it would ask the Judge to exercise his discretion by allowing either of the two convictions if the defendant would not be deterred from testifying. (Tr. 3.)

Defense counsel then informed the court that the defendant was going to take the stand but that he would waive a jury trial. (Tr. 4.) The judge told the defendant that if he wanted a jury trial he could take the witness stand without being impeached by either of his two prior convictions. (Tr. 6.) After the judge had finished questioning the defendant about his waiver, he accepted the waiver and asked the Government to present an opening statement. (Tr. 7.) Defense counsel did not raise any objection to trying the case before Judge Bryant.

Defense counsel then requested a continuance on the ground that he had been unable to check out certain facts because of the riots in Washington. (Tr. 9.) The Government opposed a continuance since defense counsel had been on the case for over a month and had already received one continuance on March 29. While defense counsel admitted that he was not exactly sure what additional facts he might find, he stated he wanted to view the area around 10th and V Streets, N.W., where defendant claimed he had found the abandoned car. The court granted a recess until 2:00 p.m. so that defense counsel could view the area and describe in greater detail his reasons for requesting a continuance. (Tr. 9-13, 18-20.)

After the recess, defense counsel described the area and indicated that he only wanted someone to verify the defendant's description of the area. He then agreed to support the defendant's description with the testimony of the two arresting officers who had also viewed the area during the recess. (Tr. 24-25.) When the trial judge asked defense counsel what evidence he would put on if he had a

thirty-day continuance, he responded, "To be truthful, Your Honor, I am not sure I could put on any more than I have to put on right now." (Tr. 24.) After defense counsel stated several times that he was satisfied with his evidence and was ready for trial, the first witness was called to the stand. (Tr. 26, 27.)

b) The Evidence

At trial, the Government called three witnesses: the owner of the stolen car, Charles Washington, and the two arresting officers, Claudius Bonner and Y. C. Laws. For the defense, the sole witness was the defendant who testified that he lacked criminal intent to steal the car since he believed it was abandoned.

Mr. Washington testified that at about 10:00 p.m. on December 23, 1967, he parked and locked his 1960 white Oldsmobile 88 in the 1300 block of Belmont Street, N.W. When he returned about an hour later, the car was gone. He had not given the defendant or anyone else permission to drive the car. Mr. Washington testified that the car was in good running condition, that there were no broken windows, no banged-up fenders and no missing hub caps. The car had new tires on the front and snow tires on the back. Mr. Washington testified that he kept his car clean and that at the time of the robbery the car was only dirty from "ordinary dirt, not from snow or anything like that." (Tr. 41.) The car had been inspected in October 1967, two months before the theft, and the current inspection sticker was on the windshield. Both license plates were properly attached to the car. (Tr. 28-33.)

When Mr. Washington picked up his car three days later at the No. 13 Precinct, there were no license plates on the car. He later found his plates underneath the front seat. To start the car, Mr. Washington used the keys he had taken with him on the night of the theft. The police had not recovered any keys, and there were no keys in the car. Mr. Washington discovered that his key to the trunk would no longer work and that the back seat had been pried loose

so someone could remove articles from the trunk. Beer cans and nuts were all over the inside of the car, the front fender had been dented, and a light had been damaged. (Tr. 33-42.)

The two police officers testified about the circumstances of the arrest. They described seeing the Oldsmobile with the license plates which were listed on their Hot Sheet of stolen cars, following the car for a few blocks and finally arresting the defendant. Both officers testified that there was no key in the ignition at the time of the arrest and that the defendant had no key in his possession when he was searched. (Tr. 46, 49-52, 73.) Officer Bonner testified that he saw another set of license plates on the floor in the back partially under the front seat. (Tr. 45-47.)

On cross-examination, both officers were questioned by the defense about the area near 10th and V Streets, N.W., where the defendant claimed he found the car. (Tr. 54-69, 74-84.) Both officers stated that they had visited the area during the noon recess on the day of the trial and had noticed some cars without license plates. One car had a yellow sticker on the windshield warning that the car would be towed away unless it was promptly removed. Officer Bonner stated that on 10th Street, N.W., near the V street intersection there was a repair shop that often put its cars on the street. Officer Laws testified that he had been patrolling the area every day during the third week of December 1967, but had not seen Mr. Washington's Oldsmobile until the night of the arrest. (Tr. 77-79, 84.)

The defendant took the stand and testified that he first saw Mr. Washington's Oldsmobile at about noon on December 24 near the intersection of 10th and V Streets, N.W. He claimed that there were no license plates on the car and that the tires were partially deflated. Consequently, he believed the car was abandoned. He found some keys in the front seat and started the car but did not drive it. He testified that he then took the keys, left the car and was walking down the street less than a block away when he found two matching license plates lying in the dirt. He returned to the car and attached these license plates so

that no one else would think the car was abandoned and strip it for spare parts. (Tr. 91-95.)

The defendant passed by the car the following day, December 25, and finally at 5:30 p.m. on December 26 he decided to take the car. He drove the car to a filling station, picked up his girl friend and was shortly thereafter arrested.

On cross-examination, the defendant admitted that he knew the car was not his and that he had made no effort to locate the owner by inquiring at the nearby repair shop, around the neighborhood or by calling the police. The defendant also admitted that he made no attempt to discover the owner of the license plates he stated he found in the dirt. (Tr. 103, 106.)

At the conclusion of the trial, Judge Bryant stated that he could not believe the defendant's testimony and found him guilty as charged. On July 5, 1968, the defendant was sentenced to a term of imprisonment from 18 to 54 months.

ARGUMENT

I. The trial judge was correct in not disqualifying himself on his own motion merely because he learned of defendant's prior convictions before the defendant waived his right to a jury trial

(Tr. 3-7, 86, 116)

The defendant argues that the trial judge should have disqualified himself on his own motion after a jury trial was waived since he had been informed of defendant's two prior convictions. The defendant apparently reasons that a trial judge is unable to sort out proper and improper evidence in reaching his decision and consequently must be protected from improper evidence to the same extent that a jury is. The defendant concludes that if a trial judge in a non-jury trial does hear erroneously admitted prior convictions, he should automatically disqualify himself or be reversed on appeal for his failure to do so. Indeed, if one accepts defendant's reasoning, whenever a judge in a non-jury trial ruled that any type of evidence was inadmissible

against the accused, he would have to disqualify himself since he had learned of the inadmissible evidence.

The defendant has presented no authority and we have found none that even implies that it might be proper for a trial judge to disqualify himself in a non-jury trial just because he learns of the defendant's prior convictions or any other type of evidence that might be inadmissible. The defendant's argument is diametrically opposed to the well-established rule that on appeal in a non-jury case it will be presumed that the trial judge did not consider improperly admitted evidence.[2]

McCormick states the rule as follows:

> "In reviewing a case tried without a jury the admission of incompetent evidence over objection will not ordinarily be a ground of reversal if there was competent evidence received sufficient to support the findings, since the trial judge will be presumed to have disregarded the inadmissible and relied on competent evidence." (Footnote omitted).[3]

A recent judicial statement of the rule is contained in *Builders Steel Co.* v. *Commissioner of Internal Revenue*, 179 F.2d 377, 379 (8th Cir. 1950), where the court held:

> "In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse a judgment in a nonjury case because of the admission of incompetent evidence, unless all of the competent evidence is insufficient to support the judgment or unless it affirma-

---

[2] See, *e.g.*, *United States ex rel. Knight* v. *Ballinger*, 35 U.S. App. D.C. 429 (1910); *Shelly* v. *Westcott*, 23 U.S. App. D.C. 135 (1904); *United States* v. *Clark*, 307 F.2d 1 (6th Cir. 1962); *Baumel* v. *Travelers Ins. Co.*, 279 F.2d 780 (2d Cir. 1960); *Pursche* v. *Atlas Scraper & Engineering Co.*, 300 F.2d 467 (9th Cir. 1961). For an extensive list of decisions applying this rule, see 5 C.J.S. *Appeal and Error* § 1564(5) (1955). See also 4 Jones, *Evidence* § 980 at p. 1847 (5th ed. 1958); Maguire and Epstein, "Rules of Evidence in Preliminary Controversies as to Admissibility," 36 Yale L. Jour. 1101, 1115-17 (1927); Comment "Exclusionary Rules of Evidence in Non-Jury Proceedings," 46 Ill. L. Rev. 915 (1952); Note, 24 Indiana L. Jour. 446 (1954).

[3] McCormick, *Evidence* § 60 at p. 137 (1954).

> tively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made."

There is no indication that the knowledge of the prior convictions in any way prejudiced the court in this case. After the initial discussion of the *Luck* issue at the beginning of the trial (Tr. 3-7.), the existence of the defendant's criminal record was mentioned only twice—when defense counsel asked the defendant where he lived before he was put in jail (Tr. 86) and when the Government indicated on cross-examination that it would not ask to impeach the defenadnt under *Luck*. (Tr. 116.)

The defendant attempts to avoid this authority by relying on *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965). This reliance is completely misplaced.

First, the Government did not use the defendant's prior convictions to impeach him when he took the stand. As the Government finished its cross-examination of the defendant, it referred to the *Luck* issue but did not ask the court to allow the impeachment of the defendant. (Tr. 116.)

Second, this Court has never indicated in *Luck* or any of the cases following *Luck* that it would be improper in any non-jury trial for a trial judge to allow impeachment with prior convictions. Indeed, the reason for limiting the use of evidence of prior crimes at trial is the fear that such evidence will prejudice a jury against the accused.[4] There is no reason to fear that a judge would be prejudiced by such information. The defendant not only asks the Court to apply *Luck* to non-jury tirals. He also must ask the Court to hold that a trial judge must disqualify himself on his own motion if he even learns of any prior convictions, regardless of whether he allows those convictions to be used for impeachment purposes. The law has never been so distrustful of a trial judge's capabilities.

---

[4] See, *e.g.*, *Luck* v. *United States*, 121 U.S. App. D.C. 151, 156, 348 F.2d 763, 768 (1965). See also, Comment, "Other Crimes Evidence at Trial: Of Balancing and Other Matters," 70 Yale L. Jour. 763 (1961); 1 Underhill, *Criminal Evidence* § 205 (5th ed. 1956).

II. The trial judge did not abuse his discretion by declining to grant to continuance since the defense counsel repeatedly stated that he was ready to go to trial, that he had the evidence he would like to present and that he would not be able to present any more evidence even if he was given a thirty-day continuance

(Tr. 9-13, 23-25)

It is of course well established that the matter of a continuance rests in the sound discretion of the trial court, whose ruling the appellate court will leave undisturbed in the absence of an abuse of discretion. See, *e.g., Gilmore* v. *United States,* 106 U.S. App. D.C. 344, 273 F.2d 79 (1959); *Neufield* v. *United States,* 73 U.S. App. D.C. 174, 118 F.2d 375 (1941). There is absolutely no factual support for defendant's contention that the trial court abused that discretion.

Defense counsel was appointed to represent defendant on February 26, 1968. The case was originally set for trial on March 29, but on that date defense counsel was granted a continuance. The record contains no indication of the reasons for that continuance.

When the case was called for trial on April 15, defense counsel requested another continuance in order to "verify and check out certain facts that defendant has given counsel." (Tr. 9.) He admitted that he could not tell the court what those additional facts were but stated that his "particular concern would be for viewing that area" around 10th and V Streets, N.W., where defendant claimed he found Mr. Washington's car. (Tr. 10, 13.)

The trial judge considered with care the request for a continuance and was sensitive to the reasons for the request.

> THE COURT: The matter that bothers me is he asked for a continuance on the 29th of March and we have had some events in the District of Columbia which have interfered with nearly every normal operation and one of those is the Courts. The only matter that concerns me is whether or not that an examination of whatever scene he says was involved, would reveal anything

> tively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made."

There is no indication that the knowledge of the prior convictions in any way prejudiced the court in this case. After the initial discussion of the *Luck* issue at the beginning of the trial (Tr. 3-7.), the existence of the defendant's criminal record was mentioned only twice—when defense counsel asked the defendant where he lived before he was put in jail (Tr. 86) and when the Government indicated on cross-examination that it would not ask to impeach the defenadnt under *Luck*. (Tr. 116.)

The defendant attempts to avoid this authority by relying on *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965). This reliance is completely misplaced.

First, the Government did not use the defendant's prior convictions to impeach him when he took the stand. As the Government finished its cross-examination of the defendant, it referred to the *Luck* issue but did not ask the court to allow the impeachment of the defendant. (Tr. 116.)

Second, this Court has never indicated in *Luck* or any of the cases following *Luck* that it would be improper in any non-jury trial for a trial judge to allow impeachment with prior convictions. Indeed, the reason for limiting the use of evidence of prior crimes at trial is the fear that such evidence will prejudice a jury against the accused.[4] There is no reason to fear that a judge would be prejudiced by such information. The defendant not only asks the Court to apply *Luck* to non-jury tirals. He also must ask the Court to hold that a trial judge must disqualify himself on his own motion if he even learns of any prior convictions, regardless of whether he allows those convictions to be used for impeachment purposes. The law has never been so distrustful of a trial judge's capabilities.

---

[4] See, *e.g.*, *Luck* v. *United States*, 121 U.S. App. D.C. 151, 156, 348 F.2d 763, 768 (1965). See also, Comment, "Other Crimes Evidence at Trial: Of Balancing and Other Matters," 70 Yale L. Jour. 763 (1961): 1 Underhill, *Criminal Evidence* § 205 (5th ed. 1956).

II. The trial judge did not abuse his discretion by declining to grant to continuance since the defense counsel repeatedly stated that he was ready to go to trial, that he had the evidence he would like to present and that he would not be able to present any more evidence even if he was given a thirty-day continuance

(Tr. 9-13, 23-25)

It is of course well established that the matter of a continuance rests in the sound discretion of the trial court, whose ruling the appellate court will leave undisturbed in the absence of an abuse of discretion. See, *e.g., Gilmore* v. *United States,* 106 U.S. App. D.C. 344, 273 F.2d 79 (1959); *Neufield* v. *United States,* 73 U.S. App. D.C. 174, 118 F.2d 375 (1941). There is absolutely no factual support for defendant's contention that the trial court abused that discretion.

Defense counsel was appointed to represent defendant on February 26, 1968. The case was originally set for trial on March 29, but on that date defense counsel was granted a continuance. The record contains no indication of the reasons for that continuance.

When the case was called for trial on April 15, defense counsel requested another continuance in order to "verify and check out certain facts that defendant has given counsel." (Tr. 9.) He admitted that he could not tell the court what those additional facts were but stated that his "particular concern would be for viewing that area" around 10th and V Streets, N.W., where defendant claimed he found Mr. Washington's car. (Tr. 10, 13.)

The trial judge considered with care the request for a continuance and was sensitive to the reasons for the request.

> THE COURT: The matter that bothers me is he asked for a continuance on the 29th of March and we have had some events in the District of Columbia which have interfered with nearly every normal operation and one of those is the Courts. The only matter that concerns me is whether or not that an examination of whatever scene he says was involved, would reveal anything

which would be meaningful in terms of defense. (Tr. 11.)

* * *

THE COURT: He has indicated to me he wants to examine it and I think he mentioned the term area of 10th and V, N.W. And for whatever purpose that area was meaningful I must take into account we have had some events which might have interfered with his being there. If I were in his shoes I would not have wanted to have gone there in that area in the last week. (Tr. 12.)

Consequently, the trial judge granted a recess until 2:00 p.m. so that defense counsel could examine the area and support his request for a continuance with any additional information he might find. (Tr. 13.) The trial judge, realizing that he might grant a continuance after he heard defense counsel's report, declined to hear the Government's first witness so that jeopardy would not attach. (Tr. 13.)

After the recess, defense counsel informed the court that he had found several abandoned cars in the area. The following exchange then took place:

THE COURT: If you had two weeks to prepare what would you put on?

MR. STUPAR: Well I don't believe I could at this point and time—I don't know, but I don't see how there is too much—.

THE COURT: If you had thirty days to prepare what would you like to put on?

MR. STUPAR: To be truthful Your Honor I am not sure I could put on any more than I have to put on right now. (Tr. 23-24.)

After some discussion, it became apparent that all defense counsel wanted was someone to verify the defendant's description of the area. Government counsel stated that he and the two arresting officers had also visited the area during the recess and that he would not object to defense counsel calling the two officers as his witnesses. (Tr. 24-25.)

The defense counsel agreed to use the testimony of the two police officers and then informed the court several times that he was ready to proceed with the trial.

> THE COURT: Are you all squared away now?
> MR. STUPAR: Yes sir.
> THE COURT: What is the situation? Do you have the type of evidence you would like to have to present?
> MR. STUPAR: I believe so Your Honor, at the present time. And it is just about as well as I could get it. (Tr. 26.)
>
> * * *
>
> THE COURT: That intent [of the defendant] is supposedly pitched against the background of certain testimony. Are you satisfied you are about to receive that background testimony?
> MR. STUPAR: I think so.
> THE COURT: All right. Are you ready to proceed under those circumstances?
> MR. STUPAR: Yes sir. (Tr. 27.)

It is thus apparent that the record is completely devoid of any showing that the trial judge abused his discretion in refusing to grant a continuance. As this court stated in *Gilmore* v. *United States,* 106 U.S. App. D.C. 344, 349, 273 F.2d 79, 84 (1959), "A party seeking review of a refusal of a continuance must make a showing that the continuance is reasonably necessary for a just determination of the cause. Such a showing is made by offering to prove what evidence, if any, will be gained by the grant and what relevance it has to the charge." However, in the present case defense counsel admitted that no additional evidence would be gained by a continuance of as long as thirty days. He told the court that he had all the evidence he needed and that he was ready to proceed with the trial. He not only failed to support his request for a continuance but completely abandoned that request after his investigation during the recess revealed that nothing would be gained by a continuance.

CONCLUSION

WHEREFORE, It is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.

J. LARRY NICHOLS,
Attorney, Department of Justice.

☆ U. S. GOVERNMENT PRINTING OFFICE 1969—331-817/P.O. 452